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On behalf of the
Society for Human Resource Management

Testimony before the House of Representatives
Subcommittee on Workforce Protections hearing on
"The Family and Medical Leave Act:
Extending Coverage to Families Left at Home"
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Introduction

Chairwoman Woolsey, Ranking Member Wilson, distinguished members of the Subcommittee, my name is Christine Vion-Gillespie and I am the Employee Relations and Compliance Manager for the SAS Institute, Inc. headquartered in Cary, North Carolina. I commend the subcommittee for holding this hearing on the Family and Medical Leave Act (FMLA) and leave for military families. I appreciate the opportunity to share my experiences with you today.

I am a certified senior professional in human resources and have over 16 years experience in human resource management in a variety of industries including hospitality, healthcare, media, and high tech software. In my current role, I manage the affirmative action program at SAS, develop policies and programs to enhance the strategic partnership between HR and the business units, and provide counseling to all levels of the HR department with regards to employee relations.

I appear today on behalf of the Society for Human Resource Management (SHRM). SHRM is the world's largest professional association devoted to human resource management. Our mission is to serve the needs of HR professionals by providing the most current and comprehensive resources, and to advance the profession by promoting HR's essential, strategic role. Founded in 1948, SHRM represents more than 225,000 individual members in over 125 countries, and has a network of more than 575 affiliated chapters in the United States, as well as offices in China and India.

SHRM is well positioned to provide insight on workplace leave policies for military personnel and their families. The Society's membership comprises HR professionals who are responsible for administering their employers' benefit policies, including paid time-off programs as

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well as FMLA leave. On a daily basis, HR professionals must determine whether an employee is entitled to FMLA, track an employee's FMLA leave, and determine how to maintain a satisfied and productive workforce during the employee's FMLA leave-related absences.

Employer Support

With the nation on a heightened military status, SHRM and its members stand in full support of the men and women serving in America's military both here and abroad. According to the Employer Support of the Guard and Reserve (ESGR), the men and women of the National Guard and Reserve comprise approximately 46 percent of the total available military manpower, a significant number of which are currently deployed. In addition, the military deployments of the Guard and Reserve are lasting longer, requiring additional sacrifices not just of those called to active duty, but of their families as well. At the same time, employers can be significantly affected when an employee is called to active duty or when a member of an employee's immediate family has been deployed. In these situations, HR professionals and their organizations work diligently to support employees and their families affected by these military call-ups. HR professionals must also ensure that their workplaces respond appropriately to shifts in personnel that are created when employees are called to active duty.

In my experience, employers believe it is important to assist employees in balancing work and personal needs and this includes employees who may be called to active duty. At SAS, we have created a culture of support for our employees who are in the armed services that extends to their families too.

One important way employers have assisted families of active duty Guard and Reserve is through compensation or pay differential. In a SHRM Weekly Online Survey conducted in April 2007, 45 percent of the randomly selected HR professionals who responded said their organizations

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offer military differential pay; 10 percent said they pay full salary and benefits for part of the employee's time on active duty; 6 percent said they do so for the entire period of activation; and 35 percent said they provide no direct compensation support to employees called to active duty.

In 2004, SAS revised its military service policy to increase the amount of time we would continue to compensate an active duty employee on military leave from 12 to 18 months. Now, employees on military leave receive the difference, if any, between their SAS salary and their military wage for up to 18 months. Employees on military leave also continue to receive health care benefits for 12 months. Because child care can be especially challenging for families when a spouse is activated, SAS allows children of employees enrolled in our Child Care Center to remain at the Center for the duration of the military leave. In addition, SAS has five social workers on staff to offer a variety of support services to employees including assistance with relocation; finding a tutor for their children; marriage and family relationship issues; financial services; eldercare and in-home resources; and grief counseling.

As a result of SAS's commitment to our military employees and their families, the North Carolina Employer Support of the Guard and Reserve committee recently presented SAS with the Pro Patria Award, the highest state-level award given to a civilian employer by the U.S. Department of Defense.

Need Comprehensive Review of FMLA

As noted earlier, HR professionals and their organizations are committed to assisting their employees in balancing both their work and family demands. Employees called to active duty, along with their families, undoubtedly face difficult times and unique challenges. SHRM applauds the Subcommittee's interest in examining ways to better support workers whose families have been impacted by a call-up. However, we strongly believe that a comprehensive review of the FMLA is

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also warranted, given that a number of military leave proposals before Congress build upon the leave requirements currently afforded to workers under this Act, and the fact that employers and employees continue to experience challenges with the practical application of FMLA in the workplace. Adding an additional leave requirement to the FMLA, regardless of how meritorious it may be, will only exacerbate the frustrations HR professionals have experienced in implementing this law.

As you know, the U.S. Department of Labor (DOL) recently completed a thorough review of the effectiveness of the FMLA regulations in which the Department received over 15,000 comments from employers, employees and other interested organizations. In June, the DOL issued a report summarizing the comments received through this process. The report noted that in many instances, when it comes to the "family" portion of FMLA, the regulations are basically working as Congress intended with few concerns for employers or employees. However, the report also highlighted that in other areas, particularly in the "medical" leave portions of the regulations, differing opinion letters, federal court rules and regulator guidance have clouded and sometimes undermined key provisions of the FMLA. While SHRM appreciates the Labor Department's efforts to initiate a dialog on the FMLA regulations, we believe the agency should take the next logical step and issue new rules as soon as possible to comprehensively address the issues raised in the review process.

As mentioned above, there are certain provisions within the FMLA regulations that work well for both employers and employees. The family leave portion of the regulations—which provides up to 12 weeks of unpaid leave for the birth or adoption of a child—has caused relatively few problems in the workplace. For example, in the *2007 SHRM Survey FMLA and Its Impact on*

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Organizations, only 13 percent of respondents reported challenges in administering FMLA leave for the birth or adoption of a child.

Key aspects of the regulations governing the medical leave provisions, however, as also discussed above, have drifted far from the original intent of the Act, creating challenges for both employers and employees. In fact, 47 percent of members responding to the *2007 SHRM FMLA Survey* reported that they have experienced challenges in granting leave for an employee's serious health condition as a result of an episodic condition (ongoing injuries, ongoing illnesses, and/or non-life threatening conditions). HR professionals have struggled to interpret various provisions of the FMLA, including the definition of a serious health condition, intermittent leave, and medical certifications.

HR professionals have two primary concerns with the Act's regulations: the definitions of "serious health condition" and "intermittent leave." For example, with regard to the definition of serious health condition, the DOL issued a statement in April 2005 advising that conditions such as the common cold, the flu, and non-migraine headaches are *not* serious health conditions. The following year, however, the DOL issued a statement saying that each of these conditions could be considered a "serious health condition." Almost anything, after three days and a doctor's visit, now qualifies as a serious medical condition (due to DOL regulations and opinion letters).

In addition, HR professionals encounter numerous challenges in administering unscheduled, intermittent leave. It is often difficult to track an employee's unscheduled, intermittent leave usage, particularly when the employee takes FMLA leave in small increments. Unscheduled, intermittent leave also poses significant staffing problems for employers. When an employee takes unscheduled, intermittent leave with little or no advance notice, organizations must cover the absent employee's workload by reallocating the work to other employees. For example,

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88 percent of HR professionals responding to the *2007 SHRM FMLA Survey Report* indicated that during an employee's FMLA leave, their location attends to the employee's workload by assigning work temporarily to other employees. In most cases, it is not cost-effective to use temporary staff because the period to train a temporary employee is sometimes longer than the leave itself. Furthermore, employers typically do not receive sufficient advance notice regarding an employee's need for FMLA leave, thereby making it difficult to obtain temporary help on short notice.

In addition to staffing problems, "intermittent leave" (as defined in the FMLA regulations) has resulted in numerous issues related to the management of absenteeism in the workplace. The most common challenge HR professionals encounter in administering medical leave, for example, is where an employee is certified for a chronic condition and the health care professional has indicated on the FMLA certification form that intermittent leave is needed for the employee to seek treatments for the condition. This certification in effect grants an employee open-ended leave, allowing leave to be taken in unpredictable, unscheduled, small increments of time. While serious health conditions may well require leave to be taken on an intermittent basis, limited tools are available to employers in order to determine when the leave is in fact legitimate. As a result, 39 percent of HR professionals responding to the *2007 SHRM FMLA Survey Report* indicated that they granted FMLA leave for requests that they perceived to be illegitimate.

SHRM supports the goals of the FMLA and wants to ensure that employees continue to receive the benefits and job security afforded by the Act. While we fully appreciate the immediacy of the issues being faced by our Guard and Reserve families and employees called to active duty, we respectfully suggest that if Congress considers proposals to expand FMLA leave coverage for military families, it should also take steps to address the underlying problems both employers and employees encounter with the FMLA.

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Legislative proposals

SHRM shares Congress' interest in providing military families additional work flexibility and looks forward to collaborating with the Subcommittee on crafting a workable solution that meets the needs of military service members, their employee caregivers, and employers. However, as outlined above, there is already a lengthy record of problems with administering leave under the FMLA due to confusing and inconsistent regulations. SHRM respectfully requests that Congress fix the documented shortfalls of the FMLA before considering additional leave benefits under this important workplace statute. In addition, we would note that the Society has fundamental concerns with a number of key provisions of the legislative proposals that have been introduced in the 110th Congress. These concerns are outlined below.

Proposal to provide leave for an exigency arising from a call-up

As you know, earlier this year the House passed H.R. 1585, the Fiscal Year 2008 Department of Defense Authorization bill, which included an amendment offered by Representatives Altmire (D-PA) and Udall (D-NM) that would expand the FMLA to provide leave for military families to deal with exigencies arising from a call to duty or an impending call to duty. This amendment is very broad, sets vague standards for leave, and does not adequately address many issues key to effective implementation, which under FMLA have led to excessive litigation. For example, in the case of a spouse called to active duty, the amendment would appear to authorize leave for a wide range of purposes from providing or arranging child care to coaching a child's baseball team, to even taking on the spouse's household chores, such as maintaining the yard. In addition, if enacted, this amendment would represent a significant departure from the original intent of the FMLA, which was intended to provide leave for employees to bond with a

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new family member, care for a seriously-ill loved one, or recover from their own serious health condition.

Furthermore, as noted previously, the most significant challenge with the current FMLA rules is in the area of intermittent leave. Since the Altmire/Udall amendment would allow leave to be taken on an intermittent basis for reasons outside the original intent of Act, SHRM and its members are extremely concerned that this proposal would only exacerbate the current problems with FMLA leave use and administration.

Proposals to provide 26 weeks of leave for caregivers

In addition to the Altmire/Udall amendment discussed above, Chairwoman Woolsey (D-CA) and Representative Darrell Issa (R-CA) have introduced H.R. 3481, the Support for Injured Servicemembers Act and H.R. 3391, the Military Family and Medical Leave Act, respectively. Both of these bills would provide up to 26 weeks of leave for FMLA-covered employees to care for relatives injured while on active duty. These proposals seek to implement the President's Commission on Care for America's Wounded Warriors' recommendation to expand FMLA leave for up to 6 months for a spouse or parent to care for an injured service member. On a similar note, an amendment offered by Senator Dodd (D-CT) and cosponsored by Senator Clinton (D-NY) to provide caregivers of injured service members 26 workweeks of FMLA leave was adopted during Senate consideration of H.R. 976, the Children's Health Insurance Program Reauthorization Act.

While these proposals represent an improvement over the Altmire/Udall approach, SHRM is concerned with the practical application of these proposals in the workplace. For example, under several of these proposals, it is unclear when an employee must take leave. Does the benefit need to be used within a specific period of time after the injury or illness is incurred? As members of the Subcommittee know, many service-connected illnesses, such as Post Traumatic Stress

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Disorder, do not surface until a significant amount of time has lapsed since the individual's military service. Therefore, SHRM recommends that any proposal to expand leave benefits to caregivers of service members should include a finite time period connected to the military service. If in fact a service member would have an impairment that qualified as a serious health condition down the road, in all likelihood, both the service member and a caregiver would be eligible for FMLA leave at that time. Finally, because the proposals outlined above include a vague standard for leave, SHRM again has concerns that this type of language would only add to the well-documented problems in complying with certain FMLA provisions.

Proposals to provide 52 weeks of leave for caregivers

Additional legislation to provide leave for caregivers of injured service members has also been introduced by Senator Barack Obama (D-IL). S. 1885, the Military Family Job Protection Act, would entitle FMLA-eligible relatives, including siblings, to 52 work weeks of job-protected leave to care for recovering service members. This proposal was also adopted in the Senate as an amendment to H.R. 976, the Children's Health Insurance Program Reauthorization Act.

Under the FMLA, an employee must have worked for an employer for 1,250 hours in order to be eligible for leave. However, there is no minimum number of hours an employee must work before taking leave under the Obama proposal. In addition, there is no length of service requirement in the Obama legislation, which presumably means that an employee would be eligible for the leave on their first day. Moreover, it is unclear whether this proposal would allow employees to take leave on an intermittent basis or what caregivers would be covered under this legislation. These shortcomings raise serious concerns for HR professionals.

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Conclusion

Clearly, the nation's men and women in uniform and their families have made significant sacrifices for the benefit of our country. SHRM appreciates the opportunity to provide testimony on proposals to provide additional leave for our nation's military families. While the goal of extending the FMLA to cover military families is laudable, SHRM would encourage policy makers to proceed with caution in advancing these types of proposals in order to limit any unintended consequences for employees, caregivers, and employers. The Society looks forward to working with the Subcommittee on workable leave policies to support caregivers of injured military service men and women.

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